GUYLER MAGRUDER

v.

CREATIVE SOFTWARE (M) SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[CIVIL SUIT NO. D2-22-1612-92]
9 MAY 1994

COMPANY LAW: Circular resolution of first defendant passed by other defendants for payment of directors remuneration - Whether defendants had acted in a manner not permitted by law or mala fide in passing the circular resolution - Whether vote of second defendant tendered through her proxy at AGM was oppressive or fraudulent - Second defendant exercising her right, as Chairman, to use her casting vote at AGM - Whether use of casting vote was in breach of her duty to act bona fide or whether it was fraudulent - Whether purpose in using casting vote was to appropriate an advantage over the first defendant to the detriment of the plaintiff - Whether plaintiff entitled to the declarations sought.

The plaintiff, an American citizen, and the second defendant, a Singapore citizen, had set up a company in Singapore to develop and market computer software packages. In 1990, the plaintiff and the second defendant decided to expand the business to Malaysia and for this purpose the first defendant was set up with an authorised capital of RM25,000 with the plaintiff and the second defendant being the only shareholders each of them having subscribed to one share. The third and fourth defendants were appointed directors of the first defendant together with the plaintiff and the second defendant, with the second defendant also holding the position of Managing Director with powers to manage the day to day operations of the first defendant.

Pursuant to the amended Article 90 of the first defendant's Articles of Association, the second, third and fourth defendants passed a circular resolution (P36) recommending the payment of directors remuneration to the second defendant, which resolution was put to the vote and adopted on a majority vote at the AGM of the first defendant held on 26 November 1992. The second defendant cast her vote twice at the AGM, once through her proxy and the other through her casting vote as Chairman of the AGM.

The plaintiff sought declarations to impeach the circular resolution, the vote of the second defendant tendered through her proxy and the second defendant's casting vote.

Held:

[1] The amended Article 90 does not specify the matters that can be resolved by way of a circular resolution. To that end the payment of directors remuneration, which is very much an internal matter, is part of the decision making process which has been alluded to in Article 79, the procedure for which is now made easier by the amended Article 90.

[2] It is true that only the Board of Directors can determine the remuneration of the Managing Director and in this instance, that determination was done not by a Board meeting of all four directors pursuant to Article 79, but through a circular resolution which for all intents and purposes has the same effect as if that determination had been taken pursuant to a Board meeting under Article 79.

[3] The plaintiff's contention that P36 is the approval for the payment out cannot be right as P36 only recommends the payment out of the directors remuneration for the approval of the members of the AGM. This is borne out by the fact that a vote was taken at the AGM and the plaintiff was outvoted by the majority and for this very reason P36, by its tenor, cannot be regarded as the approval for the payment out.

[4] The plaintiff's objection is not so much to the payment of directors remuneration as such but to the amount involved. As the payment of directors remuneration is a purely internal matter, the Courts should not be invited to fix a reasonable remuneration for the directors of a company. This is best left to the shareholders themselves.

[5] In the instant case, although the amount asked for by the second defendant represents 86% of the divisible profits of the first defendant, even after such payment is made there is still a balance of RM57,786 profit left and this is not a case where a hefty sum would be dished out from the capital of the first defendant. In the circumstances, it is not proper for the Court to question the reasonableness or otherwise of the amount to be paid to the second defendant by way of directors remuneration.

[6] The second, third and fourth defendants had not abused their powers when they

executed P36 and neither is there any evidence of malice as what was done was done within the framework of the Articles of Association of the first defendant.

[7] On the plaintiff's objection to the second defendants exercise of her votes at the AGM, the very fact that the second defendant is also a director does not render any self-interest vote exercised by her as a shareholder at the AGM in any way oppressive, as by the constitution of the first defendant she holds the positions of both a shareholder and a director. Under the circumstances of this case, there is no question of there being any conflict of interest when the second defendant exercised her proxy vote as a shareholder at the AGM.

[8] As for the plaintiff's contention that the second defendant's casting vote was biased, Article 52 of the Articles of Association provides for such a second vote to be exercised by the Chairman in the event of there being an equality of votes, which happened at the AGM. Normally the second vote follows the first vote and on the facts of this case, there was no way that the second defendant would have voted against the circular resolution. Since the Articles of Association provide for the exercise of a casting vote, there was no reason to attack that exercise by labelling it as being biased. Bias has no relevancy where casting votes are concerned.

[Plaintiff's claim dismissed with costs].

Legislation referred to:
Companies Act 1965, s. 122(1)
Evidence Act 1950, s. 114(g)

For the plaintiff - Loh Siew Cheang (Aggie Chew with him); M/s. Cheang & Ariff
For the defendant - C.V. Das (K. Mohan and Michelle Lim with him); M/s. Shook Lin & Bok

JUDGMENT

Siti Norma bte Yaakob J:
In these proceedings, the plaintiff seeks three declarations to impeach;

(1) a circular resolution of the 1st defendant dated 8 June 1992, P36, on the ground that the 2nd, 3rd and 4th defendants had in passing it, acted in a manner not permitted by law or *mala fide*.
(2) the vote of the 2nd defendant, tendered through her proxy at the second annual general meeting of the 1st defendant held on 26 November 1992, (the AGM), was oppressive or fraudulent.
(3) the 2nd defendant's casting vote, exercised at the AGM, was in breach of the 2nd defendant's duty to act *bona fide* or fraudulent in that the purpose was to appropriate an advantage over the the 1st defendant to the detriment of the plaintiff.

The other consequential reliefs sought by the plaintiff are damages against the 2nd, 3rd and 4th defendants for breach of their fiduciary duties, a permanent injunction against all four defendants, their servants or agents restraining them from implementing the resolution passed at the AGM, interest on the damages to be awarded and costs.

From the evidence, it is clear that the dispute over P36 is a dispute between the plaintiff and the 2nd defendant but to appreciate the true nature of the dispute, I shall now outline the background facts leading to the dispute.

Both the plaintiff, an American citizen, and the 2nd defendant, a Singapore citizen, reside in the Republic of Singapore. On 13 July 1985, the plaintiff converted his sole proprietorship firm, Creative Software, based in Singapore, into a private limited company known as Creative Software Pte. Ltd. (the Singapore company). The objects of the Singapore company are to develop and market computer software packages and to carry on other business related to the computer industry. Initially there were only 2 Directors and 2 shareholders, they being the plaintiff and the 2nd defendant. As the Managing and Technical Director, the plaintiff designed and developed computer programmes and software and sold them to a related company known as Creative Services Pte. Ltd., the marketing arm of the Singapore company. Creative Services also had 2 shareholders, the plaintiff and the 2nd defendant and the latter operated Creative Services and sold the computer software designed and developed by the plaintiff to the end users.

This arrangement lasted until 1988 when Creative Services ceased operations altogether and the plaintiff and the 2nd defendant devoted their time and energy to the business of the Singapore company. It was also in that year that the capital of the Singapore company was increased to S$150,000 divided into 150,000 shares at S$1 each. The plaintiff held 50,000 shares,

the 2nd defendant 50,000 shares and one Thomas Lim held the remaining 50,000 shares. Both the plaintiff and 2nd defendant continued to be the Directors of the Singapore company but not Thomas Lim.

Over the years the Singapore company grew into a profitable concern and from 1990, instead of paying dividends to the shareholders, the profits were distributed equally to the plaintiff and 2nd defendant by way of directors remuneration. For the year ending 1990, the plaintiff was paid S$301,915 whilst the 2nd defendant received S$1 less than the plaintiff (see P74 and P75). For the year ending 1991, each of them received S$260,000 (see P72 and P73) and for the year ending 1992, each of them received S$195,000 (see P70 and P71). These amounts were paid out as directors remuneration and they represented 80%-90% of the divisible profits of the Singapore company for the years 1990 - 1992.

Encouraged by the success and profits made by the Singapore company, both the plaintiff and the 2nd defendant decided to expand the business of the Singapore company to Malaysia and for this purpose a shell company was purchased in May 1990, given a new name and incorporated as the 1st defendant to carry on the same business as that conducted by the Singapore company and with a registered office in Wisma Stephens, Jalan Raja Chulan, Kuala Lumpur.

The 1st defendant has an authorised capital of RM25,000 divided into 25,000 shares of RM1 each and the only shareholders are the plaintiff and the 2nd defendant, as both of them had subscribed to one share each in the 1st defendant. They also became the Directors of the 1st defendant together with the 3rd and 4th defendants, the appointments of the 3rd and 4th defendants being merely to satisfy the statutory provisions of s. 122(1) of the Companies Act 1965, which require 2 resident Directors. Thus the Board consists of 4 Directors with the 2nd defendant holding the position of the Managing Director with powers to manage the day to day operations of the 1st defendant. For this purpose she travelled frequently to Kuala Lumpur from Singapore.

It is common ground that the plaintiff and the 2nd defendant had not only a business relationship but also a personal one which ended permanently in late 1991 or early 1992. It was following the break-up of this personal relationship, which also brought an end to their business partnership, that a number of events took place which are now being challenged by the plaintiff.

I start with P63, a Member's Resolution dated 24 December 1991, whereby acting under Article 45 of the 1st defendant's Articles of Association, the plaintiff and the 2nd defendant resolved to amend Article 90, which in its original form gives effect to a written resolution signed by all the Directors present in Malaysia as if the resolution had been passed at a meeting of the Directors duly convened and held. For practical purposes and before the amendment, a resolution signed by the 3rd and 4th defendants is effective as if such a resolution had been passed at a Board meeting convened for that purpose.

The amended Article 90 appears as P5 and whilst maintaining the original Article 90, has also included a proviso that one of the Directors signing the resolution must be the Managing Director. Thus after 14 January, 1992, a Directors Circular Resolution of the 1st defendant becomes effective if signed by the 3rd and 4th defendants together with the 2nd defendant, who has always been the Managing Director of the 1st defendant since its inception. Thus Article 90 in its original and amended form had excluded the plaintiff altogether.

It was pursuant to the amended Article 90 that P36 was passed on 8 June 1992, signed by the 2nd, 3rd and 4th defendants. It is this circular resolution, particularly the provision on directors remuneration, which is now challenged by the plaintiff as being contrary to law or *mala fide*.

Come March 1992, the 2nd defendant presented an oppression petition in the High Court, Singapore, alleging that the plaintiff was attempting to exclude her from the management of the Singapore company. In 1993, the Singapore High Court ordered the plaintiff to purchase the shares of the 2nd defendant in the Singapore company at a price to be valued by Price Waterhouse.

The 1st defendant held its Annual General Meeting on 26 November 1992, which was attended by the plaintiff and chaired by the 2nd defendant and it was at this AGM that P36 was put to the vote and adopted upon the majority vote of the 2 shareholders, the plaintiff and the 2nd defendant, with the latter casting her vote twice, once through her proxy and the other

through her casting vote. The plaintiff now challenges the exercise of these 2 votes.

Coming to P36, it is clear from the pleadings and from the evidence adduced that what is being questioned by the plaintiff is the exercise of the powers conferred to the 2nd, 3rd and 4th defendants under the amended Article 90. Hence any reference to the word "fraud" in the pleadings must mean fraud on the power and not common law fraud. This distinction is most relevant as the burden of proof in the former is on the balance of probability whilst the latter is the criminal law burden of proof beyond reasonable doubt.

The 3rd and 4th defendants were not called to testify and this prompted the plaintiff to urge me to invoke s. 114(g) of the Evidence Act 1950. It is not disputed that they are only nominee Directors and this has been so pleaded in paragraph 3(a) of the statement of claim. As such, their absence at the trial does not in any way assist either the plaintiff or the 2nd defendant and to that end, objection as to their absence as witnesses merits no consideration whatsoever.

It is clear from P36 that the authority to pass the circular resolution is derived from the amended Article 90 but nonetheless the plaintiff complains that the 2nd defendant's motive in passing P36 was to exclude him from the decision - making process of the 1st defendant and to that extent the 2nd defendant had abused or exceeded her powers as a Director of the 1st defendant. It is not disputed that Article 90 in its original form was a practical convenience to circumvent Article 79 which requires the meeting of all 4 Directors to decide on the day to day business of the 1st defendant. Article 90 in its original form empowers the 3rd and 4th defendants, the Malaysian Directors, to pass a circular resolution. However, when Article 90 was amended and such amendment was readily agreed to by the plaintiff, it must be to keep the 2nd defendant, as the Managing Director, informed of all such circular resolutions passed. The amended Article 90 and for that matter the original Article 90, do not specify the matters that can be resolved by way of a circular resolution. It is silent as far as this is concerned and to that end, I consider that the payment of directors remuneration, which is very much an internal matter, is part of the decision making process which has been alluded to in Article 79, the procedure for which is now made easier by the amended Article 90.

It is true that only the Board can determine the remuneration of the Managing Director and in this instance, that determination was done not by a Board meeting of all 4 Directors pursuant to Article 79, but through a circular resolution which for all intents and purposes has the same effect as if that determination had been taken pursuant to a Board meeting under Article 79.

The plaintiff complains that he was not aware of P36 until it was produced at the AGM on 26 November 1992. This is not altogether correct as it is his evidence that sometime in September 1992, he was given P53, P55 and P57 by the 2nd defendant's secretary in Singapore with instructions that he was to append his signature on those documents. He did not do so but kept them in his possession and now relies on those documents to establish that the 2nd defendant had an improper motive in executing them.

P53 in substance is very similar to P36 except that it is undated, it is not signed by the 4th defendant and the words "Not in Malaysia" appearing above the plaintiff's name in P36 do not appear in P53. There is also a blank space in the amount of directors remuneration in P53 but the figure of RM244,550 is very apparent in P36. It was this blank space which held back the plaintiff from signing P53.

P53 was accompanied by P55, a proxy form to be executed by the plaintiff appointing the 3rd defendant as his proxy to vote on his behalf at the 1st defendant's second AGM to be held on 30 June, 1992, at 2.00 p.m. P57, which was also handed to the plaintiff together with P53 and P55, is the 2nd defendant's signed proxy form appointing the 4th defendant as her proxy to vote on her behalf at the same AGM.

The 2nd defendant has explained that her secretary in Singapore handed the 3 documents to the plaintiff by mistake as it has always been her habit of affixing her signature to all the 1st defendant's documents and leaving them to her secretary for further action. Her secretary, in turn, would date such documents or if they also require the signature of the plaintiff, her secretary would pass the documents to the plaintiff for his signature. It is her contention that this may well have happened in this case.

It must be remembered that by September 1992, the plaintiff and the 2nd defendant were no longer on speaking terms and that they communicated with each other through third

parties and through impersonal memos like D135 and D137. Under these circumstances, it would not be out of the ordinary to expect the 2nd defendant's secretary, after seeing that P53 had already been signed by the 2nd defendant, to hand it over to the plaintiff for his signature. The tender of P55 and P57 does not make sense altogether as by September 1992, the 2 documents had already become obsolete as the occasion being the AGM fixed for 30 June 1992, when these 2 documents were to be used, had already passed. Additionally, I see no purpose of P57 being tendered to the plaintiff at all unless it was to influence the plaintiff that since the 2nd defendant had signed P55, he should likewise sign P57.

In any event, the plaintiff did not sign these 3 documents and I do not consider their execution by the 2nd defendant and the tender to the plaintiff in themselves can amount to any improper motive on the part of the 2nd defendant to steal a march on the plaintiff. At most, I consider it to be an administrative blunder on the part of the 2nd defendant but given the situation that both she and the plaintiff eyed each other with scorn and suspicion, it is no wonder that documents which had long become obsolete were still considered to be good and subsisting.

There was no AGM held on 30 June 1992, and the 2nd defendant testified that initially she intended to hold the AGM on that date but this did not take place. Instead the AGM was refixed for 5 November 1992, and this is borne out by P38, a notice of the AGM dated 19 October 1992. However, the AGM was postponed to 26 November 1992, due to lack of quorum. Under Article 46, two members present, either in person or by proxy, shall form the quorum. Thus both the plaintiff and the 2nd defendant must be present in person or by their proxies for there to be a quorum. In this instance, P38 could not be served on the plaintiff as he had not notified the 1st defendant of his address. The plaintiff was however made aware of the adjourned AGM through P40 dated 10 November 1992, and he was present at that adjourned meeting on 26 November 1992.

From this evidence it is clear that by early September 1992, and for sure by 11 November 1992, the plaintiff was aware that there was this matter of payment of directors remuneration to be tabled at the AGM although it is conceded that at that period of time the amount had not been declared and neither is it apparent in whose favour the payment was to be made. The plaintiff made no attempt to find out. In this respect, just as the plaintiff complains that the 2nd defendant was stealing a march on him and keeping him in the dark as to the affairs of the 1st defendant, his conduct in keeping silent cannot be discounted altogether. As a Director of the 1st defendant, the plaintiff could easily have discovered the presence of P36 from the secretary of the 1st defendant particularly when his suspicion had already been aroused by P53 and to that end he cannot now complain that he was not aware of P36 before 26 November 1992.

The only part of P36 which is being challenged is the payment of RM244,550 directors remuneration and in substance it reads as follows.

> *Directors Remuneration*
>
> That the payment of Directors remuneration for the year ended 31 December 1991 amounting to RM244,550 be recommended for the approval of the members at the second annual general meeting.

The plaintiff contends that P36 is the approval for the payment out and in this respect I consider that the plaintiff cannot be right as P36 only recommends the payment out of the directors remuneration for approval of the members at the AGM. This is borne out by the fact that a vote was taken at the AGM and that the plaintiff was outvoted by the majority and for this very reason P36 by its tenor cannot be regarded as the approval for the payment out.

The plaintiff also contends that since the 2nd defendant has an interest in P36, as she is the Director who is to benefit from the payment out, she is not empowered by the amended Article 90 to pass a circular resolution but she should have instead called a Directors' meeting, under Article 92, wherein she could declare her interests and allow the other Directors to decide on such payment out.

My answer to this is that the amended Article 90 does not limit the matters to be passed by way of a circular resolution. There is nothing unusual or out of the ordinary when a company decides to pay its Directors who manage the affairs of the company. In this instance, there is evidence, both oral and documentary, that the 2nd defendant had managed the 1st defendant single handedly. The idea of setting up the 1st

defendant may well have originated from a general consensus of both the plaintiff and the 2nd defendant but it is very clear that the 2nd defendant managed the 1st defendant from the very beginning. The plaintiff has admitted that by mid 1991 to November 1992, he never visited the 1st defendant and that his attendance at the Singapore company also declined over the years and by late 1991, he was prepared to discuss their respective remunerations in the two companies as seen from D137. Then in February 1992, he offered to retire on terms and conditions as stated in D135.

All these considerations add to one sore point that the objection is not so much to the payment of directors remuneration as such but that of the sizeable amount involved. As I consider the amount of directors remuneration to be a purely internal matter, Courts should not be invited to fix a reasonable remuneration for the Directors of a company. This is best left to the shareholders themselves. In this instance the amount asked for by the 2nd defendant represents 86% of the divisible profits of the 1st defendant and even after such payment is made, there is still a balance of RM57,786 profit left. This is clearly seen from P27 and as such, this is not the case where a hefty sum would be dished out from the capital of the 1st defendant. The 1st defendant is a going concern and if he had wanted to, the plaintiff could have asked to be remunerated as well. Under these circumstances, I consider that it is not proper for this Court to question the reasonableness or otherwise of the amount to be paid to the 2nd defendant by way of directors remuneration.

Turning back to the conflict of interest issue, if in fact the 2nd defendant had proceeded under Article 92 and asked that the sum of RM244,550 be paid to her as her remuneration for being the Managing Director, it would then be left to the plaintiff, the 3rd and 4th defendants to decide on her entitlement, but under the peculiar circumstances of this case, I would think that she would have achieved the same result as that brought by P36. I say this, as the plaintiff has admittedly averred in paragraph 4 of his statement of claim that both the 3rd and 4th defendants are aligned to or accustomed to act upon the instructions of the 2nd defendant. The 3rd defendant is the 2nd defendant's personal secretary whilst the 4th defendant is an employee of the management company that renders secretarial services to the 1st defendant. In all probability, the 3rd and 4th defendants would have supported the payment out to the 2nd defendant and the end result is that the plaintiff would again be outvoted by the majority. In this instance, the issue is not the means by which the directors remuneration can be approved to the 2nd defendant. The issue is whether the manner of such payment out adopted through the exercise of a circular resolution can be regarded as an improper exercise of a power or that it was exercised *mala fide*.

For the reasons that I have given, I consider that the 2nd, 3rd and 4th defendants had not abused their powers when they executed P36 and neither is there any evidence of malice as what was done was done within the framework of the articles of association of the 1st defendant.

Finally I come to the plaintiff's objection as to the exercise by the 2nd defendant of her two votes at the AGM, one through her proxy, the 4th defendant, and the other through her casting vote.

While conceding that there is no restriction preventing a shareholder from voting in a matter over which he has an interest, the plaintiff nonetheless argues that the 2nd defendant's proxy vote is oppressive on the ground that as a director, there is the element of a conflict of interest present.

The AGM is strictly a shareholders meeting as opposed to a directors meeting. Unlike companies whose equity is distributed to many shareholders, the 1st defendant has only 2 shareholders, the plaintiff and the 2nd defendant, and to that extent the 1st defendant is a private company limited by shares.

The plaintiff and the 2nd defendant also constitute 2 of the 4 Directors in the 1st defendant, the other 2, the 3rd and 4th defendants, merely nominees to the Board. As such, when the plaintiff and the 2nd defendant attended the AGM, they were qualified to do so by virtue of their equity participation in the 1st defendant. The very fact that the 2nd defendant is also a director does not, I consider, render any self interest vote exercised by her as a shareholder at the AGM in any way oppressive, as by the constitution of the 1st defendant, she holds the enviable position of being both a shareholder and a director. The same is true of the plaintiff himself. Under the circumstances of this case, there is no question of there being any conflict of

interest when the 2nd defendant exercised her proxy vote as a shareholder at the AGM.

As for the plaintiff's contention that the 2nd defendant's casting vote was biased, Article 52 does provide for such a second vote to be exercised by the Chairman in the event of there being an equality of votes. This had happened at the AGM.

Normally, the second vote follows the first vote and on the facts of this case, there is no way that the 2nd defendant would have voted against the circular resolution. Since the articles of association provide for the exercise of a casting vote, there is no reason to attack that exercise by labelling it as being biased. Bias has no relevancy where casting votes are concerned.

For the reasons that I have given, the plaintiff cannot possibly succeed on the declarations and the other reliefs sought in this suit and to that end, I dismiss this action with costs.

KHA CHAI TIAM

v.

T. S. AUTO & MACHINERY SERVICES

HIGH COURT, SHAH ALAM
DATO' RANITA HUSSEIN JC
[CIVIL SUIT NO. 22-198-90]
23 JUNE 1994

PRACTICE & PROCEDURE: Appeal - Dismissal of O. 14 application - Goods sold and delivered - Cheques dishonoured - Whether any triable issues.

BILLS OF EXCHANGE: Sale of forklifts to defendant - Forklifts delivered and indorsed 'received in good order' - Post-dated cheques given to plaintiff - Cheques dishonoured - Conflicting versions as regards 1st cheque - Rule applicable to bills of exchange - Exceptions - Defendant raising 'fraud' and 'illegality' - Allegation that chassis numbers of forklifts tampered with - Allegation forklifts under ownership of two finance companies - Defence suspicious - Consideration of s. 7, 10(3) of the Road Transport Act 1987 - Section 38 of the Hire Purchase Act 1967.

The plaintiff sold 11 forklifts to the defendant which were delivered on 20 & 22 December 1989 respectively and indorsed as 'received in good order' by the defendant. The defendant paid by way of 4 post-dated cheques of RM44,000 each but all 4 cheques were dishonoured upon presentation. 3 cheques were returned by the bank as the defendant had closed its account but there were two conflicting versions in respect of the 1st cheque. According to the plaintiff, the defendant had replaced the cheque with 2 payments totalling RM44,000 upon being notified of the dishonoured cheque which money was loaned to the defendant on 21 March 1990. The defendant contended that the contract of sale had been cancelled via letter dated 10 November 1989 when it was discovered that the chassis numbers of 7 forklifts were different from that in the registration cards. By that time the defendant had paid the plaintiff RM44,000 as shown by payment slips exhibited in support dated 11 & 13 January 1990 respectively. The plaintiff subsequently repaid the money upon their demand but failed to return the 3 cheques whereupon the defendant closed its bank account. After cancelling the sale the defendant proceeded to repair the forklifts at the request of the plaintiff but the plaintiff refused to pay the costs of the repair and storage charges for which the defendant filed a counterclaim against the plaintiff.